

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

PETROCLEAN, INC

Employer

and

Case 6-RC-12379

AUTOMOTIVE CHAUFFEURS, PARTS, GARAGE
AND AIRLINE EMPLOYEES, LOCAL UNION NO.
929 a/w INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Petroclean, Inc, is engaged in providing environmental services for industrial facilities. The Employer's facilities are located in Carnegie, Pennsylvania and Columbus, Ohio, where it employs a total of approximately 28 employees. The Petitioner, Automotive Chauffeurs, Parts, Garage and Airline Employees, Local Union No. 926 a/w International Brotherhood of Teamsters, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit, as amended at the hearing, of all full-time and regular part-time service and maintenance employees, including truck drivers, mechanics, warehouse employees, spill response managers¹ and technicians employed by the Employer at its Carnegie, Pennsylvania, and Columbus, Ohio, facilities;² excluding all office clerical employees, custodians, waste compliance employees, storage tank inspectors, managerial employees, dispatchers and guards, professional employees and supervisors as defined in the Act. A hearing officer of the

¹ The parties stipulated that the two spill response managers, Josh Snow and Chad Graham, are not supervisors as they possess none of the authorities set forth in Section 2(11) of the Act.

² The parties are in agreement that an employer-wide multi-facility unit is appropriate.

Board held a hearing and the Employer filed a timely brief with me, which has been duly considered.

As evidenced at the hearing, the parties disagree on whether the Employer's four foremen³ are supervisors within the meaning of the Act. Although the parties are otherwise in accord with respect to the scope and composition of the unit, the Petitioner, contrary to the Employer, contends that the foremen must be excluded from any unit because they are statutory supervisors.

I have considered the evidence and the arguments presented by the parties as to the supervisory status of the foremen. As discussed below, I have concluded that the Petitioner has not met its burden of establishing that the foremen are statutory supervisors. Accordingly, I have directed an election in a unit that consists of approximately 32 employees, including Fonner, Nastold, Rohall and Albertini.

To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations. I will then present in detail the facts and reasoning that supports each of my conclusions on the issue.

I. OVERVIEW OF OPERATIONS

The Employer is a full service provider of environmental services. This work involves clean-up work in responding to plane crashes, train derailments, truck accidents and the handling of hazardous and non-hazardous spills at facilities. The Employer also performs "mill work" which is described as tank cleanings and pit cleanings. The Employer's principal office is located in Carnegie, Pennsylvania. The Employer also operates a small facility in Columbus, Ohio.⁴ The Employer's Director of Operations, Michael J. Lauderbaugh,⁵ is responsible for the

³ The four foremen are Jeffrey Fonner, John Nastold, Jim Rohall and Scott Albertini. They are all employed at the Employer's Carnegie facility.

⁴ Employed at the Columbus facility are a full-time spill response manager, a full-time driver, and approximately 6 or 7 part-time employees.

⁵ Lauderbaugh also holds the title of Director of Health and Safety.

overall operations of the Employer. Reporting to Lauderbaugh are the dispatchers who schedule crews for the jobsites. The Regional Manager for the Columbus area, Kelly McCullough, also works out of the Carnegie facility, and presumably she also reports to Lauderbaugh. For complex jobs or those scheduled to last for three or more weeks, the Employer may utilize one of five individuals to act as a project manager.⁶ On more routine jobs, the crew consists of a foreman, a driver and 1 to 2 technicians. At times, the Employer will assign two technicians to very short-term jobs with a narrowly defined scope of work.

The Employer's jobs are categorized as scheduled jobs and emergency spills. The process by which the Employer performs scheduled jobs begins when a client calls with a work request. One of the Employer's sales staff then meets with the client to determine the scope of the project. The sales employee then completes a project initiation sheet which sets forth the job information, number and type of personnel and equipment needed for the job, the anticipated work duration, the scope of the work, site specific information and any special arrangements. The project initiation sheet is then forwarded to the dispatcher who assigns a specific foreman, driver and technician(s) to the job. Once the foreman is selected, he will review a copy of the project initiation sheet, which enables him to gather the equipment listed on the sheet and to contact the salesperson with any questions.

Clients requiring emergency spill response⁷ contact the Employer and will speak with one of the spill response managers or Lauderbaugh.⁸ Once the initial contact with the client is completed, the dispatchers are instructed to contact the employees required to perform the spill response work.⁹ The crew then goes to the spill site. The spill response manager or

⁶ When a job warrants a project manager, the Employer utilizes Lauderbaugh, McCullough, Sales Manager Mark Slack, Storage Tank Inspector Bryan Kowalski and Waste Compliance employee Kevin Schlipp. None of the foremen has ever been assigned to act as a project manager.

⁷ Emergency spill response is required in the event of accidents, such as tanker truck spills or train derailments.

⁸ If a call comes in after normal business hours, the Employer's answering service calls Lauderbaugh.

⁹ The record indicates that some of the part-time technicians employed by the Employer perform only emergency spill response work.

Lauderbaugh meets with the client and directs the crew on how to perform the clean up. The record indicates that if Lauderbaugh is not present on site, he is in constant communication with the spill response team.

All field employees report first to the facility out of which they work. The employees load a vehicle with the necessary equipment each morning and return the vehicle and equipment to the facility each evening. Once at the jobsite, the foremen advise their crew members as to the work they are to perform. Foremen are also responsible for completing daily operational paper work which lists the employees on the crew, the time the crew left for the job, the equipment that was used and the scope of the work that was completed. The foremen submit this form to the dispatcher. The form is then forwarded to the Accounting Department for use in generating a bill to the client. The record establishes that the foremen spend the other 90 to 95 percent of their time working with the crew.

The record indicates that foremen are responsible for safe operations in the field. In this regard, the foreman is to communicate safety procedures, such as wearing a hard hat, to the crew. If a crew member refused to follow a safety procedure, the foreman is to notify Lauderbaugh. Lauderbaugh then contacts the individual by phone or, if necessary, will go to the jobsite. The foreman is expected to notify Lauderbaugh of any incident or problems on the jobsite which could result in disciplinary action against an employee.¹⁰ Lauderbaugh will then interview the foreman and the individual who violated the safety or disciplinary rule.¹¹ Other than reporting the facts, the foremen have no role in the imposition of discipline.

¹⁰ Notwithstanding this expectation, the record indicates that Lauderbaugh often learns of such problems from the client.

¹¹ The record indicates that foremen have been written up for failure to provide information about a project incident. The record contains one example of a field employee not wearing the proper safety equipment. Although the foreman told the individual to wear the equipment, the employee did not correct the situation. Lauderbaugh learned of the incident when the client related it to another individual at the Company. Both the offending employee and the foreman were disciplined.

All jobs are scheduled for a set number of hours. In cases where a crew cannot finish the job in the designated number of hours, the foreman will call the dispatch office. The dispatcher then contacts the salesperson responsible for the project to communicate the situation to the customer. When the customer expresses its preferences as to when the work will be completed (i.e. either by staying late or returning the next day), the salesperson relates this information to the dispatcher who in turn informs the foreman.

The record indicates that foremen are selected based on their longevity and experience with the Employer. Foremen are not required to have any extra training or certifications. Foremen enjoy the same fringe benefits as drivers and technicians, and they participate in the Employer's Incentive Program for Field Personnel. This incentive program enables field employees to receive \$250 per quarter if they have no safety violations, vehicle accidents or call-offs during the quarter. No other employee, including those who serve in the position of project manager, is eligible to participate in this incentive program. The record further indicates that foremen, drivers and technicians are all placed on the Employer's on-call list. As such, at some point each month, they will be called out, presumably to deal with emergency spills.

The Employer considers foremen to be salaried employees because they are guaranteed a 40-hour work week,¹² whereas drivers and technicians will work only when scheduled.¹³ During the Employer's slow time, it appears that drivers and technicians are often scheduled less than 40 hours per week.¹⁴ The record further establishes that certain technicians work part-time for the Employer either to perform regularly scheduled work or to respond to emergency spills. In such cases, contact with the technicians is made by the dispatchers or Lauderbaugh, but is not made by the foremen.

¹² Foremen do receive either overtime pay or compensatory time off if they work overtime.

¹³ Because they are not guaranteed a certain number of hours each week, technicians and drivers are required to document their time. Technicians punch a time clock at the facility and drivers complete daily paperwork and Department of Transportation logbooks in lieu of timecards.

¹⁴ The record indicates that foremen earn approximately \$40,000 per year, whereas drivers' earnings range from \$30,000 to \$35,000, and technicians' earnings range from \$22,000 to \$25,000 per year.

All field employees wear the same uniform which consists of navy pants and a light blue shirt with a Company emblem and the name of the employee. The record indicates that, at times, project managers will wear the same uniform as field employees. However, project manager may also arrive at the site wearing blue jeans. All of the field employees have keys to the facility and have access to the keys to the equipment. In addition, all field employees request vacation time in writing to Lauderbaugh. The foremen are not given any preference as to their vacation request, as vacations are usually awarded on a first-come, first-served basis. Finally, foremen do not attend any supervisory or management meetings and they do not fill in for dispatchers or any of their other superiors.

II. SUPERVISORY STATUS OF FOREMEN

Section 2(11) of the Act defines the term supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 710–712 (2001); Michigan Masonic Home, 332 NLRB 1409 (2000). This is a substantial burden in light of the exclusion of supervisors from the protection of the Act. The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital – Los Angeles, 328 NLRB

1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, supra, at 1409. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Moreover, the issue of supervisory status is highly fact-specific and job duties vary; thus, per se rules designating classifications as always or never supervisory are generally inappropriate. Brusco Tug & Barge Co., 247 F.3d. 273, 276 (D.C. Cir. 2001).

The Board and the courts have observed that the Act sets forth a three-pronged test for determining whether an individual is a supervisor within the meaning of the Act.

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'

Franklin Home Health Agency, 337 NLRB 826, 829 (2002), citing NLRB v. Kentucky River Community Care, Inc., supra.

The exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees" does not confer supervisory status. Franklin Home Health Agency, supra at 829, citing Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985)

With regard to whether the foremen possesses any of the 12 indicia of supervisory status listed in Section 2(11) of the Act, it is noted that there is no contention or record evidence that they hire, transfer, suspend, lay off, recall, promote, discharge, reward, adjust employee grievances or effectively recommend such actions. Accordingly, I will address only the Petitioner's arguments made orally at the hearing that the foremen are supervisors because they recommend discipline and can authorize employees to work overtime or to leave early. The Petitioner also asserted that the foremen are supervisors because they are usually the

senior company representative at the field work site and, as such, they conduct the affairs of the Employer.

In considering whether the foremen possess any of the supervisory authority set forth in Section 2(11) of the Act, I note that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” Chicago Metallic Corp., supra at 1688. I conclude, for the reasons discussed below, that the Petitioner has not met its burden of establishing that the foremen are statutory supervisors. Rather, the foremen are the type of individuals that Congress did not wish to exclude from the coverage of the Act.

With respect to the recommendation of discipline, the record establishes that Lauderbaugh determines whether discipline is to be issued. At most, foremen will report a safety violation to Lauderbaugh. The record further establishes that Lauderbaugh often finds out about incidents through sources other than the foremen. At that point, he must investigate the incident and decide whether the foreman too should be disciplined for failure to report the incident. In any case, the record establishes that foremen play, at most, a reportorial role in the disciplinary process.

As to authorizing employees to work overtime or to leave early, the record establishes that the foremen do not possess the authority to make such decisions on their own. Rather, any need to work overtime is communicated to the dispatcher who will then contact the sales employee. The sales employee determines with the customer how the need should be handled. As to leaving early, there is no evidence in the record to establish that the foremen have ever authorized any employee to leave work early. In fact, in cases of illness, the foremen must call Lauderbaugh. In this type of circumstance, Lauderbaugh will go to the jobsite to pick up the ill employee in that there is no way for an employee to leave a jobsite because all of the Employer’s specialized equipment must be packed up and loaded into a company vehicle. The equipment is then transported with the employees back to the facility.

By asserting that the foremen are the senior Employer representatives at field work sites and that they “conduct the affairs of” the Employer, the Petitioner appears to be asserting that the foremen have the authority to assign work to other employees and to responsibly direct them.

The assignment of work pursuant to plans and schedules developed by higher management does not establish supervisory status. In Quadrex Environmental Company, Inc., 308 NLRB 101 (1992) and McCullough Environmental Services, 306 NLRB 565 (1992), the Board found that the leads and lead operators, respectively, were not supervisors. In both of those cases, as here, the leads assigned tasks that were predetermined by management and carried out their jobs under the direction of management according to a detailed project plan or an extensive checklist established by management. Any non-routine problems had to be reported to management. In McCullough, the Board noted that the mere fact that the lead operators were, at times, the highest authority at the plant did not itself establish supervisory authority.

The record in this case indicates that the scope of the work, the number of employees and the equipment to be used is set forth on the project initiation sheet. Any questions regarding the project must be directed to the sales employee handling the job. Once on the job the foremen direct their crews according to the directives on the project initiation sheet. Any problems on the site relating to employee safety or discipline are to be reported to Lauderbaugh. Likewise, if a job cannot be finished in the time allotted, the foremen cannot independently determine how or when to complete the job. They are required to consult with the sales employee who will consult with the client. While foremen may lead the crew as to various tasks and safety procedures on the jobsite, the record establishes that the foremen work with their crews 90 to 95 percent of their time.

III. CONCLUSION AS TO THE STATUS OF THE FOREMEN

Based on the foregoing, the record as a whole, and having carefully considered the arguments of the parties, I find that the Petitioner has failed to meet its burden of proving that the foremen are statutory supervisors. Rather, the foremen are, at best, merely “strawbosses” who do not exercise any independent judgment with respect to the Section 2(11) indicia. See, e.g., Somerset Welding & Steel, Inc., 291 NLRB 913, 914 (1988); Dura-Vent Corporation, 257 NLRB 430, 431-432 (1981).

Finally, the record shows that the foremen share the same pay structure, benefits and working conditions with other field employees. Accordingly, I conclude that the foremen are not supervisors and I have included them in the unit.

IV. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time service and maintenance employees, including foremen, truck drivers, mechanics, warehouse employees, spill response managers and technicians employed by the Employer at its Carnegie, Pennsylvania, and Columbus, Ohio, facilities; excluding all office clerical employees,

custodians, waste compliance employees, storage tank inspectors, managerial employees, dispatchers and guards, professional employees and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Automotive Chauffeurs, Parts, Garage and Airline Employees, Local Union No. 929 a/w International Brotherhood of Teamsters, AFL-CIO. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before **October 6, 2004**. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to

follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST (EDT), on **October 13, 2004**. The request may **not** be filed by facsimile.

Dated: September 29, 2004

/s/ Gerald Kobell

Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
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